SCHEDULE OF EXHIBITS

Designation	Content
Exhibit A-1	Order of Federal district court in Civ. Ac. 3-7268, dismissing action against seven individuals
Exhibit A-2	Order of Federal district court in Civ. Ac. 3-7267, dismissing action against two insurance companies
Exhibit B	Copy of appellate court's reported opinion in the instant case
Exhibit C	Copy of statute: Section 1442
Exhibit D	Final order of appellate court denying petition for rehearing
Exhibit E	Copy of notice of appeal

EXHIBIT A-1

In The

United States District Court

For The Northern District of Texas
Dallas Division

Civil Action No. CA-3-7268-D

Donald M. Peterson, Plaintiff

v.

Bill West, James A. Martin, III, Harold Stafford, Martha A. McSteen, Carl Gruninger, James A. Adams, and Donald Paul Chancellor, Defendants

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment filed by the defendants came on for hearing before the court, Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion that the motion should be sustained. The issues raised by the plaintiff in the above styled case are the identical issues which were resolved on their merits in Civil Action No. CA-3-5158-D and cannot again be litigated between the same parties and their privies. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522 (1931).

It is therefore ORDERED that the Motion for Summary Judgment filed by the defendants is sustained.

Robert M. Hill,
United States District Judge

Dated this 6th day of December, 1973.

EXHIBIT A-2

In The

United States District Court

For The Northern District of Texas
Dallas Division

Civil Action No. CA-3-7267-D

Donald M. Peterson, Plaintiff

v.

Blue Cross/Blue Shield of Texas, Group Medical & Surgical Service and Group Hospital Service, Inc., Defendants

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment filed by the defendants came on for hearing before the court, Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion that the motion should be sustained. The issues raised by the plaintiff in the above styled case are the identical issues which were resolved on their merits in Civil Action No. CA-3-5158-D and cannot again be litigated between the same parties and their privies. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522 (1931).

It is therefore ORDERED that the Motion for Summary Judgment filed by the defendants is sustained.

United States District Judge
Robert M. Hill,

Dated this 6th day of December, 1973.

EXHIBIT B

Donald M. Peterson, Plaintiff-Appellant,
v.
Blue Cross/Blue Shield of Texas et al., Defendants-Appellees.

Donald M. Peterson, Plaintiff-Appellant,
v.
Bill West et al., Defendants-Appellees.

No. 74-1374.

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1975.

Physician brought action seeking damages for alleged malicious prosecution and for tortious conduct related to his alleged wrongful suspension under medicare program. The United States District Court for the Northern District of Texas, Robert M. Hill, J., granted defendants' motion for summary judgment, and physician appealed. The Court of Appeals, Dyer, Circuit Judge, held that action for damages alleging wrongful suspension of physician under medicare program brought against vice president of state medical services corporation and various HEW employees was properly removed from state court; that the district court had jurisdiction of the parties and the subject matter; and that all defendants had governmental immunity from suit.

Affirmed.

1. United States 141(8)

Evidence in action brought by physician seeking damages

for alleged malicious prosecution and wrongful suspension under medicare program was sufficient to sustain finding that vice president of state medical services corporation and various HEW employees who were defendants in the action were either officers of the United States or of an agency thereof or persons acting under such officer and that their actions were under color of such office.

2. United States 125(28)

Corporate defendants in action brought by physician seeking damages for alleged wrongful suspension under medicare program which were simply medicare fiscal intermediaries acting pursuant to contract with the government qualified for protection under doctrine of sovereign immunity.

3. Removal of cases 21

Purpose of federal officer removal statute is to prevent federal officers or persons acting under their direction from being tried in state courts for acts done within the scope of their federal employment. 28 U.S.C.A. §§ 1442, 1442(a)(1).

4. Removal of Cases 21

Action brought by physician against vice president of state medical services corporation and various HEW employees for damages for alleged malicious prosecution and wrongful suspension of physician under medicare program was properly removed into federal court under federal officer removal statute. 28 U.S.C.A. § 1442(a)(1).

5. United States 78(13)

Where vice president of state medical services corporation, which was employed as fiscal intermediary for Medicare,

and various HEW employees did not act outside scope of employment in suspending physician under medicare program, such defendants enjoyed full immunity under doctrine of sovereign immunity from subsequent action brought by a physician seeking damages for alleged malicious prosecution and wrongful suspension.

Appeals from the United States District Court for the Northern District of Texas.

Before DYER, SIMPSON and CLARK, Circuit Judges.

DYER, Circuit Judge:

In these two cases (consolidated on appeal) Dr. Peterson sought damages for malicious prosecution and for tortious conduct related to his alleged wrongful suspension under the Medicare program. The district court granted summary judgment for the defendants. We affirm.

The first suit was filed May 8, 1973, in a Texas state court against West, Vice President of Blue Cross of Texas, Stafford and Martin, Regional and Assistant Regional Counsel, respectively, of the Department of Health, Education and Welfare, and McSteen, Gruninger, Adams and Chancellor, all H.E.W. employees, whose duty it was to insure the integrity of the Medicare program. The claims made in this suit are admittedly identical (except for malicious prosecution) with the claims made in Peterson v. Weinberger, 5 Cir. 1975, — F.2d — this day decided. Likewise, the defendants are the same in both suits except for the addition here of the defendants West, Stafford, and Martin.

The second suit filed a week later, on May 17, 1973, in a Texas state court was against Blue Cross/Blue Shield of Texas, Group Medical and Surgical Services, and Group Hospital Service, Inc. It raised the identical issues against the same corporate defendants as were included in *Weinberger, supra.* Admittedly this was a "protective" suit filed in the state court against the contingency that the federal court would determine in *Weinberger* that it was without jurisdiction over the corporate defendants.

Final judgment in *Weinberger* was entered on October 29, 1973. The district court found that Peterson had failed to prove a claim for either breach of contract or tort damages. It further found that the agents and employees of the Government had immunity from liability because they had acted within the scope of their employment in suspending Peterson and withholding payments due him under the Medicare program because of his possible fraud. The court also found that Peterson and his brother had submitted false claims to the Government, for which they were cast in damages.

A petition for removal under 28 U.S.C.A. § 1442(a)(1),[1] was timely filed in both state court cases in behalf of all the defendants as officers, employees, and agents of the United States. The district court granted summary judgment for the Government, finding that the issues prseented were identical

[1] 28 U.S.C.A. § 1442 provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the distric court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under hm, for any act under color of such office.

to those resolved on the merits in *Weinberger* and therefore should not be relitigated. We have this day affirmed *Weinberger* in all respects.

Peterson makes a two-pronged attack in these cases. He contends that both cases were improperly removed and should have been remanded, *ergo* the district court was without jurisdiction to pass upon the merits. He next argues that, even if the district court had jurisdiction, the judgment in *Wienberger* does not operate as *res judicata* because in one of these suits, a new cause of action (malicious prosecution) was alleged, and in the other, three additional defendants were included.

Although we are strongly inclined to the view that the issues resolved in *Weinberger* were identical to the issues in these suits and are therefore *res judicata* as to the same defendants *and their privies*, we prefer to sustain the district court's judgment on the grounds that the removal of the suits was proper, the district court had jurisdiction of the parties and the subject matter, and all the defendants had governmental immunity from liability.

The defendants in these suits, except West, Stafford and Martin, were defendants in *Weinberger*. West's official capacity and his duties and responsibilities were detailed by him in that proceeding. Stafford and Martin, Regional and Assistant Regional Counsel, H.E.W., here named as co-conspirators, are alleged to have carried out the same illegal acts leading to Peterson's Medicare suspension as were attributed to the *Weinberger* defendants.

[1, 2] It is indisputable that each of the defendants was either an "officer of the United States or an agency thereof, or persons acting under him" and that their actions were "under color of such office." Peterson urges however, that what he labels as tortious conduct took the defendants beyond the scope of their statutory authority. We took some pains in *Weinberger* to relate the factual background leading to the suspension of Peterson and concluded that "[t]here is not the slightest indication that any of the individual defendants acted outside of their line of duty or the scope of their employment in carrying out their official responsibilities" Peterson v. Weinberger, *supra*, at 3580. We further concluded that since the corporate defendants were simply Medicare fiscal intermediaries, acitng pursuant to a contract with the government, they were under the sovereign immunity umbrella.

[3] The purpose of the removal statute is to prevent federal officers or persons acting under their direction from being tried in state courts for acts done within the scope of their federal employment. In Willingham v. Morgan, 1969, 395 U.S. 402, 405, 89 S.Ct. 1813, 1815, 23 L.Ed.2d 396, the Supreme Court noted that "the removal statute is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases when federal officials must raise defenses arising from their official duties" On this premise, the Court further noted that "the test for removal should be broader, not narrower, than the test for official immunity." *Id.* In fashioning a broad application of the statute, the Court said:

> The federal officer removal statute is not "narrow" or "limited." Colorado v. Symes, 286 U.S. 510, 517 [52 S.Ct. 635, 637, 76 L.Ed. 1253] (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. . . . This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1). *Id.* 395 U.S. at 406-407, 89 S.Ct. at 1816.

In a variety of circumstances removals under § 1442(a)(1) have been upheld; for example, Chafin v. Pratt, 5 Cir. 1966, 358 F.2d (libel and slander suit against eight employees of the Public Health Service's Communicable Disease Center); Murphy v. Kodz, 9 Cir. 1965, 351 .2d 163 (mid-air plane collision wrongful death suit against an officer of the United States Forest Service); Poss v. Lieberman, 2 Cir. 1962, 299 F.2d 358 (libel suit against a claims representative of H.E.W.); Texas v. National Bank of Commerce of San Antonio, 5 Cir. 1961, 290 F.2d 229 (*quo warranto* suit by Texas against National Bank for violation of Texas law).

[4, 5] We conclude that the defendants in the instant actions were persons acting within the purview of § 1442(a)(1) and that the suits were properly removed. Removability having been established, the district court had jurisdiction to consider the controversy. What we said in *Weinberger* concerning immunity is fully applicable here. The entry of judgments for the defendants was proper.

Affirmed.

EXHIBIT C

U.S.C. Title 28, § 1442

1442. Federal officers sued or prosecuted.—(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a non-resident of such State, wherein juridsiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process. (June 25, 1948, c. 646, § 1, 62 Stat. 938.)

EXHIBIT D

In The

United States Court of Appeals

For The Fifth Circuit

No. 74-1374

Donald M. Peterson, Plaintiff-Appellant,

v.

Blue Cross/Blue Shield of Texas, et al., Defendants-Appellees.

Donald M. Peterson, Plaintiff-Appellant,

v.

Bill West, et al., Defendants-Appellees.
Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(March 26, 1975)

Before DYER, SIMPSON and CLARK, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

EXHIBIT E

In The

United States Court of Appeals

For The Fifth Circuit

No. 74-1374

Donald M. Peterson, Plaintiff-Appellant,

v.

Blue Cross/Blue Shield of Texas, et al., Defendants-Appellees.

Donald M. Peterson, Plaintiff-Appellant,

v.

Bill West, et al., Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice given by:
Glynn A. Pugh
5101 Ross Ave., Suite 201
Dallas, Texas 75206
Attorney for Appellant

1. Notice is hereby given that Dr. Donald M. Peterson, the plaintiff above-designated, hereby appeals to the Supreme Court of the United States from the final order entered in this case on March 26, 1975, which denied plaintiff's petition for rehearing.

2. The parties in each of the two proceedings are as follows:

First case: *Peterson v. Blue Cross/Blue Shield of Texas*

Name	*Party*
Donald M. Peterson	Plaintiff

Group Hospital Service, Inc.	Defendant
Group Medical & Surgical Service	Defendant

Second case: *Peterson v. Bill West et al.*

Name	*Party*
Donald M. Peterson	Plaintiff
Bill West	Defendant
James A. Martin, III	Defendant
Harold Stafford	Defendant
Martha A. McSteen	Defendant
Carl Gruninger	Defendant
James A. Adams	Defendant
Donald Paul Chancellor	Defendant

3. The Court of Appeals judgment in this case was to the following effect:

(1) the Federal courts have jurisdiction over every defendant, as each defendant proved his entitlement to the benefits of 28 USC Sec. 1442(a)(1);

(2) every defendant is entitled to official immunity;

(4) therefore, the two cases are dismissed.

4. In a separate letter the Clerk is requested to prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, to include items in the transcript as needed and as agreed to by counsel for the Defendants-Appellees.

5. The following questions are presented by this appeal:

(1) Though without legislatvie powers, the lower courts

here legislated by amending 28 USC Sec. 1442(a)(1), by eliminating therefrom a material part of the sentence and thereby accepting jurisdiction of a case not properly transferrable under Section 1442(a)(1) from the State to the Federal court system.

(2) The appellate court (Court of Appeals) erred in making assumptions of fact which were unproven, which facts were the predicate upon which Federal court jurisdiction was based.

(3) The appellate court's decision is contrary to *Scheuer v. Rhodes* (April, 1974) 40 L.Ed. 2d 90 in that absolute and blanket immunity was granted to nine different defendants without any hearings or evidence whatsoever as to their immunity. Granting of such personal defenses, not raised by defendants in the lower court, was error. They were presented as a crosspoints in defendant's brief to the appellate court.

This notice given by

Glynn A. Pugh, Attorney for the Plaintiff-Appellant, Dr. Donald M. Peterson